

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AC/22/0186

Claim

1. The claimant is the child's mother. The claim was lodged with the Tribunal in November 2022. The claimant states that the responsible body discriminated against the child in terms of Section 15 of the Equality Act 2010 (2010 Act), by treating this child unfavourably as a result of a matter arising in consequence of his disability. The claimant also states that the responsible body have failed in their duty to make reasonable adjustments for the child in terms of Section 20 of the 2010 Act and discriminated against the child by breaching their statutory duties under section 85(2) of the 2010 Act.

Decision

2. The responsible body has discriminated against the child by treating the child unfavourably and by putting him at a disadvantage because of the distressed behaviours and social communication difficulties that arise in consequence of his disability. The responsible body have not shown that this treatment is a proportionate means of achieving a legitimate aim. The responsible body has also failed to make reasonable adjustments in terms of section 20 of the Act. This means that the child has been discriminated against by being provided with a part-time education instead of a full-time education, for the purposes of section 85(2) (f) of the 2010 Act.
3. As a result of these contraventions, I make the following orders under schedule 17, paragraph 9(2) of the 2010 Act:
 - a. I order that the responsible body makes a written apology to the child for the discrimination that has occurred within 14 days of the date of receipt of this

decision by the responsible body. The letter must be in the form provided in guidance issued by the Scottish Public Services Ombudsman.

- b. I order that the responsible body undertake a review of their policies in relation to the use of part time timetables for children with disabilities within 2 months of the date of this decision.
- c. I order that the responsible body make provision for and facilitate access to an appropriate, consistent full-time education for the child, with the child's views being fully considered in the provision of the foregoing within 2 months from the date of this decision;
- d. I order the responsible body to develop and implement a behavioural protocol in collaboration with the claimant and the child within 2 months from the date of this decision.
- e. I order that the responsible body design and implement a communication passport in collaboration with the claimant and the child within 2 months of the date of this decision,

Process

4. The claim was first lodged in November 2022. The case has a lengthy procedural history. There were a series of case management calls with a full hearing due to take place in June 2023. This was discharged and proceedings suspended until November 2023 to allow for a mediation process to take place between parties which did not resolve matters. This was followed by a further series of case management calls and the fixing of an oral hearing for April 2024. Subsequent to the oral hearing taking place, the responsible body stated that they were withdrawing all opposition to the claim with the matter proceeding as an unopposed claim. Following the withdrawal of the responsible body's opposition, the claimant's solicitor requested that a hearing take place on the papers only with the convener sitting alone to which I agreed.

5. Witness statements and written submissions were lodged by the claimant's solicitor prior to the paper hearing and an advocacy report that I had previously directed to seek the child's views on the matters raised in the claim was also lodged.
6. The final bundle, including the foregoing late documents which were added, extended to T001 - 144 (tribunal documents), C001 - 041 (claimant's documents) and RB001 - 019 (responsible body's documents).

Findings in Fact

The child

7. The child was born in 2007. The child lives with the claimant (his mother), his father and his younger brother.
8. The child has a diagnosis of Autism which was made in 2011 and Type 1 Diabetes which was made in 2021. The child's Autism causes sensory processing issues, difficulties with social interaction and difficulties with communication with peers and adults. The child also experiences anxiety.
9. The child has been referred to Child and Adolescent Mental Health Services ('CAMHS') to be assessed for a Learning Disability and the outcome of this assessment is not yet known.
10. The child can become overwhelmed quickly and often becomes stressed and anxious as a result. The child can become emotionally dysregulated when in this state. At such times the child may use inappropriate strategies such as hitting out or use inappropriate language.
11. The child's anxiety and stress can also be triggered by perceived challenges from another person such as a teacher or another pupil. The child can struggle with loud noises. The child has sensory sensitivities including at times feeling too hot.
12. The child dislikes any mention of Autism and is very sensitive about his diagnosis. The child does not want to acknowledge that some of his needs are different to other children.

13. The child requires structure and routine to be provided in a controlled environment. The child requires constant supervision and support. When in the school building the child is likely to be in a high state of alert or anxiety almost continuously.
14. There is a list of approximately thirty words to which the child responds negatively when he is in a heightened state. The child can become emotionally dysregulated if the child hears these words being used.
15. The child does not have a peer group and relies on his close family for social interactions. The child is very active and needs to constantly move to help self-regulate. The child enjoys outdoor activities and swimming.

The child's education

16. The child was enrolled at the Autism base at the local mainstream secondary school to start secondary one (S1) in August 2021 where he commenced on a part-time timetable.
17. Until around February 2024 the child attended school for four days each week for two periods each day' resulting in six hours and forty minutes of school each week. The claimant transported the child to school on these days. The journey to school takes forty minutes each way and the claimant requires to wait for the child at school until he is finished. The child has also received outdoor learning as part of the child's education provision.
18. The claimant has requested full-time access to education for the child on a regular and consistent basis. The claimant has not agreed to the provision of a part-time education. The child has not at any time refused to attend school.
19. Since commencing the S1 there have been a number of core group meetings, child plan meetings and education meetings held where both the responsible body and the claimant have been in attendance along with other professionals involved in the child's education.

20. Since November 2022, the child has been provided with around seven different educational timetables none of which have resulted in the provision of a full-time education to the child.
21. The child requires a highly personalised package of support in order for him to be able to access a full-time education safely. This includes the provision of one to one support for the child when he is at school.
22. The claimant requested a Coordinated Support Plan ('CSP') for the child around March 2021 which was first produced in draft form in May 2022 (T-038). The responsible body have apologised to the claimant for the delay in the completion of the draft CSP with no explanation being provided by the responsible body for this delay.
23. The draft CSP contained a number of educational objectives for the child including that the child needed to access full time educational provision. The plan also identified that an appropriate behaviour protocol for the child and his family was required to support the child to emotionally regulate and manage his behaviour at home, at school and in the community.
24. An educational psychologist report was produced in June 2022 (T-015). This report was intended to summarise the responsible bodies understanding of the child's strengths and needs with a view to identifying the most appropriate approach to supporting the child's education.
25. The child experienced a number of exclusions following the child exhibiting distressed behaviours and emotional dysregulation in October 2022, November 2023 and Feb 2024.
26. The claimant sought to provide the school with a full list of the thirty or so "trigger" words for the child to reduce the risk of emotional dysregulation. The claimant offered to do so on more than one occasion. The school did not agree to this as the school did not

consider this would be manageable and refused this list. The school subsequently agreed (in October 2022) that it would be useful to have a list of these trigger words.

27. The responsible body commenced a recruitment process around November 2022 for a pupil support assistant ('PSA') to support the child at school. This role was not filled.

Reasons for the Decision

The burden of proof

28. The terms of s.136 of the Act requires the claimant to make out a *prima facie* (on the face it) case and if this is done, the burden of proof then shifts to the responsible body. The tribunal accepted that the onus of the burden of proof in this particular case rested with the responsible body. The responsible body have withdrawn opposition to the claim and no formal response or defence to the claim is before the tribunal.

General remarks on the evidence

29. The hearing took place on the papers only. Included in the bundle were detailed witness statements lodged on behalf of the claimant from the educational psychologist who had produced a report for the child's school in June 2022 (T015), from the child's social worker and from the claimant. There were no witness statements lodged by the responsible body. There was no evidence within the bundle that contradicted the statements that were lodged on behalf of the claimant.

General remarks on the legal test

The claim

30. This is a case under Part 3, paragraph 8 of schedule 17 of the 2010 Act; being a claim that the responsible body has contravened chapter 1 of part 6 (School Education) of the Act, because of a person's disability. The claimant in their written submissions avers that the responsible body has breached their statutory duties in section 85(2) (a) (b) (c) and (f) of the 2010 Act. The written submissions lodged however focussed principally on section 85 (2)(f) as did the case statement which also made specific reference to this section. This provides that the responsible body of a school must not discriminate against a pupil by subjecting the pupil to [any other] detriment.

31. The claim is made under sections 15 (discrimination arising from disability) and section 20 (failure to make reasonable adjustments) of the 2010 Act. These were each considered separately.

Discrimination arising from disability (section 15)

32. The claimant avers that the child's lack of full-time education is discriminatory under s.15 of the 2010 Act that is discrimination arising from a disability. Section 15 of the 2010 Act provides that:

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

33. The tribunal was satisfied that the child is a disabled person in terms of section 6 of the Act and further that the responsible body was fully aware of the child's disability. Accordingly section 15(2) does not apply. The tribunal required therefor to consider whether or not the terms of section 15(1) were established.

Question 1) By failing to provide the child with a full-time education did the responsible body treat the child “unfavourably”?

34. The child has not been provided with access to a full-time education since starting secondary school. The part -time timetable offered to the child has meant that the child has missed out on a substantial period of education and missed out on the opportunities that would clearly have been afforded had he been in receipt of a full-time education. All children in Scotland have a right to education and the responsible body were at all material times under a duty to provide the child with a full timetable of education.

35. The Technical Guidance for Schools in Scotland (updated version published September 2023) by the Equality and Human Rights Commission (the Technical Guide) describes ‘unfavourably’ as follows: ‘This [the disabled person] must be put at a disadvantage’ (5.21). and goes on to state that “Disadvantage’ is not defined in the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion’.

35. The child has been denied the opportunity of a full-time education. Accordingly the tribunal decided that the child had been treated unfavourably in terms of the Act.

Question (2) Was the treatment because of something arising “in consequence of ” the child’s disability ?

36. The answer to this question from the available evidence was yes. There was clear evidence that but for the child’s disability, the child would not be on a part-time timetable.

37. The evidence suggests that the school continued to take a reactionary approach to the provision of education to the child. There did not appear to be a consistent plan or strategy to support the child to access full-time education. The child requires a high level of consistent individual support along with very clear behavioural plans and protocols to support the child to manage his emotional responses which are a consequence of the child’s disability.

Question (3) Has the responsible body shown that the treatment was a proportionate means of achieving a legitimate aim?

38. There is no opposition to the claim. No reasons or evidence were advanced to justify that the restrictions placed on the child accessing a full-time education were a proportionate means of pursuing a legitimate aim. There was some evidence that the safety of the child and others was a consideration in the child having limited time within the school building. There was however no evidence of an appropriate behavioural support plan being in place and shared with staff to help support the child and staff when the child became emotionally dysregulated. It was not clear why, three years after starting secondary school, other educational resources were not in place for child to allow him to participate in activities either in or outside of a school building. It was unclear why further arrangements were not made to recruit a PSA to support the child either in or outside of a school building. The educational psychologist stated that “there are lots of other ways to do learning.” (C010). There is insufficient evidence to conclude that providing the child with a part-time timetable was a proportionate response to the legitimate aim of keeping the child and others safe. It is also evident and an important factor that the child is not a school refuser and the claimant has supported and encouraged the child to access education at all material times.

39. The Technical Guidance states (5.49) ‘It is for the school to justify the treatment. It must produce evidence to support its assertion that it is justified and not rely on mere generalisations’ The Technical Guidance also states (5.38) ‘In a case involving disability, if a school has not complied with its duty to make reasonable adjustments , it will be difficult to show that the treatment was proportionate’ and ‘The duty to make reasonable adjustments requires a school to take positive steps to ensure that disabled pupils can fully participate in the education provided by the school’. There was no evidence presented to confirm that such positive steps had been taken to allow such full participation.

40. There is no evidence that the provision of a part-time education to the child over three years of secondary education was a proportionate means of pursuing the legitimate aim of keeping the child or others safe.

Failure to make reasonable adjustments

Section 20 of the 2010 Act – Failure to make reasonable adjustments

41. The claimant submits that the responsible body failed to make reasonable adjustments under s.20 of the 2010, (referred to here as ‘failure to make reasonable adjustments’).
42. The responsible body’s duty to make reasonable adjustments in terms of section 85(6), section 20 and schedule 13 to the 2010 Act is an anticipatory duty. Section 20(3) of the 2010 Act provides:
- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
 - (2) The duty comprises the following (three) requirements.
 - (3)..... where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
43. The requirement in section 20(3) applies in this case. This means that the responsible body was required to take such steps as were reasonable for them to have to take to avoid the child being placed at a substantial disadvantage by any provision, criterion or practice. Section 21 states that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments, and that the responsible body discriminates against the child if it fails to comply with that duty.
44. The Technical Guidance states (6.11) ‘The duty to make reasonable adjustments requires a school to take positive steps to ensure that disabled pupils can fully participate in the education provided by the school, and that they can enjoy the other benefits,

facilities and services that the school provides for pupils'. The Technical Guidance goes on to state that (6.13) 'A school's duty to make reasonable adjustments is an anticipatory one owed to disabled pupils generally, and therefore schools need to think in advance about what disabled pupils might require and what adjustments might need to be made for them.'

45. "Provision, criterion or practice" is not defined in the Act. The Technical Guidance suggests that provisions, criteria and practices covers the way in which a school operates on a daily basis, including its decisions and actions (6.20). This approach is a sensible one. I have interpreted "provision criteria or practice" to include the way that education or access to education is offered to a child or young person.

Substantial Disadvantage

46. The reasonable adjustments duty is triggered only where there is a need to avoid 'substantial disadvantage'. 'Substantial' is defined as being anything more than minor or trivial. The pupil must be at a substantial disadvantage in comparison with non-disabled pupils. In this case it was clear that the child was at a substantial disadvantage in that he was not being provided with a full-time education. There can be little doubt this placed the child at a substantial disadvantage educationally and developmentally.

Reasonable adjustments

47. The duty to make reasonable adjustments requires schools to take what are referred to in the Act as 'reasonable steps' to make adjustments. The Act does not say what is 'reasonable'. The Technical Guidance however provides a list of factors that are likely to be taken into account when considering what adjustments it is reasonable for a school to have to make (6.29) . These include:

- a. The extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil
- b. The effect of the disability on the individual
- c. The need to maintain academic, musical, sporting and other standards
- d. The interests of other pupils and prospective pupil

48. The claimant highlights a number of adjustments that the claimant considers should have been made by the responsible body. The claimant suggests these adjustments were reasonable adjustments. The claimant argues that if these adjustments had been made they would have resulted in an effective full-time programme of education to be in place for the child or at least have allowed for a realistic plan on how this might be achieved in the longer term. The adjustments suggested by the claimant include training for school staff, the child having his own space within school, providing the child with an exit plan at times of distress and planning emotional regulation strategies to provide the child with the tools to help him manage his emotions. The claimant also suggests the use of a communication passport to assist and support the child when different adults are working with the child. The claimant further suggests that a reasonable adjustment would have been for the school to allow the claimant to provide them with list of the thirty words that could be a “trigger” for the child with a view to reducing the child’s stress and anxiety when at school and increasing staff awareness of these triggers. The evidence suggests that most of these suggested adjustments have proposed to responsible body over the course of meetings and emails between the claimant and the responsible body.
49. The claimant also argues that the educational psychologist’s report produced in June 2022 (T-015) contains a number of different suggested approaches to supporting the child at school. These included a clear positive behavioural plan with guidance about de-escalation, and a plan for when the child is involved in a challenging event. It is not clear from the available evidence what steps, if any were taken by the responsible body to implement the suggested approaches contained within the psychologists report. No evidence was offered by the responsible body to highlight that the conclusions of the psychological report were implemented in any significant way.
50. The claimant also refers to the terms of the draft CSP which highlighted that a functional assessment of the child’s behaviours was required in order to inform positive behaviour plans and strategies (T-052). It is unclear from the evidence whether or not this was properly actioned or whether or not steps were taken by the responsible body to develop and implement an appropriate behavioural support plan for the child. No evidence was offered by the responsible body to demonstrate that a functional assessment of the child’s behaviours was completed.

51. The claimant also argues that a reasonable adjustment would be to have an appropriate plan in place which directly addresses and plans for the adequate management of the child's support needs to increase access to education in a planned and supported manner appropriate to what the child is able to manage.

52. The responsible body have been aware of the child's disabilities at all material times and engaged in various meetings and discussions with the claimant and other professionals working with the child. The responsible body arranged for one to one provision for the child when he was in the school building and placed the child in a classroom on his own. It is evident from both the terms of the draft CSP of May 2022 and the psychologist report of June 2022 that other approaches and strategies were possible and available but not progressed in any significant way. In particular the provision of a behavioural support plan for the child. The adjustments proposed by the claimant to the responsible body around the use of a communication passport and providing the school with details of the child's "trigger words" also did not appear to be progressed in any significant way by the responsible body. These particular proposed adjustments do not appear to be onerous or costly. The Technical Guidance states (6.12): 'Many reasonable adjustments are inexpensive and will often involve a change in practice rather than the provision of expensive pieces of equipment or additional staff'.

53. A change in practice was in essence what the claimant suggested to the responsible body by the use of a communication passport, provision of the child's trigger words to increase staff awareness and the development of an appropriate behavioural support plan for the child. These adjustments to the provision of education for the child are reasonable adjustments that could have been made by the responsible body. No evidence or explanation is available for the tribunal to reach a different conclusion as the responsible body has not offered any.

54. The claimant argues that that there is a real prospect that if the foregoing reasonable adjustments had been made they would have succeeded and prevented the child being isolated and dysregulated and out of education. It is further submitted by the claimant's solicitor in the written submissions lodged that there need not be a good or real prospect

of a proposed adjustment removing a disabled service user's disadvantage for that adjustment to be reasonable. An adjustment might be reasonable and therefore required, where there is a prospect that it will succeed. The claimant referred me to the decision of *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10 per Keith J [paragraph 17]:

“In fact, there was no need for the Tribunal to go as far as to find that there would have been a good or real prospectIt would have been sufficient for the Tribunal to find that there would have been just a prospect of that.”

55. I was satisfied on the evidence available that the adjustments proposed by the claimant, in particular those referred to in paragraphs 50 – 53 above had the prospect of removing the disadvantage in which the child was placed. The proposed adjustments looked to address some of the triggers for the child's emotional dysregulation and also put in place a plan for safely managing any such dysregulation. It is likely that the proposed adjustments would have supported the child to access education. These reasonable adjustments should have been made to avoid the substantial disadvantage. I accept the claimant's submission that the adjustments suggested at paragraphs 50- 53 above should have been made by the responsible body and that these adjustments were reasonable adjustments which would have promoted the child's ability to access full-time education and inclusion in his learning.

Remedies

56. In determining appropriate remedies in this case, I was mindful that my primary focus should be the impact that the discrimination has had on the child involved. The claimant reports that the child has no connection with a community, lacks confidence and lacks self-esteem. The child is not a school refuser. The child's advocacy statement suggests that he is keen and willing to learn about certain subjects, particularly maths and science. The child also states that he enjoys swimming and PE. In determining appropriate remedies for this claim I was also focussed on considering what orders would be most likely to prevent further unlawful discrimination to the child who continues to have an ongoing entitlement to a full-time education.